



State of Wisconsin
Governor Scott Walker

Department of Agriculture, Trade and Consumer Protection
Ben Brancel, Secretary

DATE: October 30, 2013

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Ben Brancel, Secretary *Ben Brancel*
Sandy Chalmers, Administrator, Division of Trade and Consumer Protection *Sandy Chalmers*

SUBJECT: ATCP 93 Flammable, Combustible and Hazardous Liquids
ATCP 94 Petroleum and Other Liquid Fuel Products;
Rulemaking Scope Statement

TO BE PRESENTED BY: Judy Cardin and Kevin LeRoy

REQUESTED ACTION:

At the November 13, 2013 Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the DATCP Board to approve a "Statement of Scope" (copy attached) for proposed amendments to current DATCP rules related to flammable, combustible and hazardous liquids; and rules related to petroleum and other liquid fuel products. The tank inspection program and the petroleum inspection program were transferred from Department of Safety and Professional Services (DSPS) to DATCP as of July 1, 2013. Administrative rule chapters governing these programs (Ch. SPS 310 and SPS 348) were transferred to DATCP as part of the 2013-15 Biannual Budget (2013 Act 20). The Legislative Reference Bureau has authority to renumber rules, and is in the process of renumbering Chs. SPS 310 and SPS 348 to ATCP 93 and ATCP 94, respectively. DATCP proposes to make a number of technical and organizational changes to these rules to more fully integrate them into DATCP regulatory programs. In addition, DATCP proposes to make various updates to these rules to keep them consistent with nationally recognized standards, and EPA guidelines.

A scope statement spells out the general purpose and scope of a proposed rule. DATCP may not begin drafting a proposed rule (including a proposal to amend or repeal an existing rule) until the Governor approves a scope statement for the proposed rule and the DATCP Board approves the scope statement. In accordance with 2011 Wisconsin Act 21 (s.227.135(2), Stats.), the Governor approved this scope statement for permanent rule changes on October 15, 2013 thereby allowing DATCP to submit this scope statement for publication and to seek approval of the scope statement by the DATCP Board.

DATCP must publish a draft scope statement in the Wisconsin Administrative Register, and file a copy with the Department of Administration (DOA), at least 10 days before the Board approves the scope statement. DATCP filed the attached statement of scope with the Legislative Reference Bureau for publication in the October 31, 2013 issue of the Wisconsin Administrative Register. DATCP also filed a copy with DOA.

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If the Board approves the scope statement, the Department will begin work to draft the permanent rule. Approval of a scope statement is just the first, preliminary step in a lengthy process for enacting permanent rules. The Board will have at least two further opportunities to review the proposed rule. The Board must approve a hearing draft rule before DATCP may hold public hearings on the rule proposal. The Board must also approve the final draft rule before DATCP may adopt the rule. The permanent rule will be effective when the final draft has been approved by the DATCP Board, approved by the Governor, completed the legislative review process and adopted by the Secretary.

STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection

Rule No.: Ch. ATCP 93 (existing as Ch. SPS 310 -- to be renumbered by LRB)
Ch. ATCP 94 (existing as SPS 348 -- to be renumbered by LRB); SS. SPS
305.02, SPS 305.06, SPS 305.68, and SPS 305.82 to SPS 305.89, Wis. Adm.
Code

Relating to: Flammable, Combustible and Hazardous Liquids; and Petroleum and Other
Liquid Fuel Products

1. Description of the objective of the rule:

1.1 Incorporating programs transferred from DSPS

With the enactment of 2013 Wisconsin Act 20 (the biannual budget bill), the state of Wisconsin transferred the *Flammable, Combustible and Hazardous Liquids program* ("tanks inspection program") and *Petroleum and Other Liquid Fuel Products program* ("petroleum inspection program") from the Department of Safety and Professional Services ("DSPS") to the Department of Agriculture, Trade and Consumer Protection ("DATCP"). Act 20 authorizes the transfer of existing administrative rules relating to these programs from DSPS to DATCP (with the approval of the Secretary of the Department of Administration). [See Section 9138, (2) (fm) and (4) (f).] The Legislative Reference Bureau will use its authority to renumber the affected rules from Chapters SPS 310 and 348 to Chapters ATCP 93 and 94.

Other aspects of the transfer must be addressed through administrative rulemaking. DATCP intends to initiate rule revisions to make technical and organizational changes to the portions of Chs. SPS 302 and 305 that relate specifically to the tanks and petroleum inspection programs. Chs. SPS 302 and 305 also contain general administrative provisions (licensing, enforcement, etc.) that relate to a wide variety of DSPS regulatory programs. DATCP will consider incorporating similar provisions directly into Chs. SPS 310 and SPS 348 as necessary to administer the tanks and petroleum inspection programs. These changes will integrate the tanks and petroleum inspection programs into DATCP's other regulatory programs and will provide clarity to regulated industries.

1.2 Updating existing rule relating to tanks

Before these programs were transferred to DATCP (effective July 1, 2013), tanks inspection program staff and DSPS legal staff had been actively working on rule changes to SPS 310. The scope statement for this rulemaking was published in January, 2011. A working draft of a proposed rulemaking order has been transferred to DATCP. DATCP intends to evaluate and further develop this draft and incorporate many of the proposed changes into this rulemaking project. The proposed revisions would make numerous minor technical changes to the rule to

make it more readable and practical. The proposed revisions would also bring the rule into alignment with current EPA standards and current generally accepted industry practices.

DATCP will also consider updating the fee structure for underground storage tank permits to conform to other DATCP licensing and permit programs. Currently, there is no financial penalty for tank operators who fail to file permit renewals by the annual expiration date. Many similar DATCP programs incorporate a late surcharge or other penalty.

1.3 Updating existing rule relating to petroleum and other liquid fuel products.

Ch. SPS 348 incorporates by reference ASTM standards for fuel specifications and testing procedures. Many of the standards referenced in the current version of SPS 348 are from 2007 or 2008. DATCP will consider updating these references to more recent versions of the ASTM standards. The more recent standards for gasoline require gasoline to meet specifications after ethanol is mixed into the gasoline.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

History and background. During the 1980's and early 1990's, Wisconsin's tanks and petroleum inspection programs were housed within the Department of Industry Labor, and Human Relations (DILHR). These programs were transferred to the Department of Commerce ("Commerce") in 1996. They were transferred from Commerce to DSPS as part of the 2011-13 Biannual Budget (2011 Wisconsin Act 32). SPS 310 was previously titled ILHR 10 and COMM 10. SPS 348 was previously titled ILHR 48 and COMM 48. In 2008, Commerce completed an extensive and comprehensive update to SPS 310 (which was COMM 10 at the time),

Proposed policies. DATCP will reorganize the rules to conform to other ATCP chapters of the administrative rules. Generally, each existing ATCP chapter consists of an individual program or subject matter, and is largely self-contained. In contrast, existing SPS chapters of the administrative code are organized by function as well as by subject matter. For example, a number of individual DSPS programs (including tank inspection and petroleum inspection) rely on SPS 302 to designate fee amounts, SPS 303 to establish administrative procedures, and SPS 305 to specify required licenses, certifications, and registrations. DATCP intends to reorganize SPS 310 and 348 to incorporate fees, enforcement provisions, licensing requirements, and other administrative topics directly into the chapters.

DATCP proposes to continue work begun by DSPS on a number of updates and revisions to SPS 310. These updates and revisions are, generally technical in nature, clarify existing requirements, or update requirements to conform to EPA requirements.

DATCP will also consider updating the fee structure for underground storage tank permits and reinspections to conform to other DATCP licensing and permit programs. Currently, there is no financial penalty for tank operators who fail to file permit renewals by the annual expiration date or tank operators who fail to fix relatively minor problems, thereby requiring inspectors to make

multiple reinspection trips. Many similar DATCP programs incorporate surcharges or other penalties.

DATCP proposes to review Ch. SPS 348 and revise it as necessary to conform to recent industry practices and the latest nationally accepted fuel specifications and testing procedures (as published by ASTM International).

DATCP will also contemplate adapting by reference the engine fuel quality standards published in NIST Handbook 130. About 15 states (including Illinois but not Wisconsin's other neighbors) have adopted this model regulation.

Policy Alternatives. Do nothing. If the department does not alter the structure of the existing rules, its authority to administer the tanks and petroleum inspection programs will continue to rely on a non-statutory provision (Section 9138) of 2013 Act 20. This would become increasingly impractical and confusing as time goes on.

If the department does not implement the numerous technical updates, the rule would be more difficult to understand than necessary, and remain inconsistent with the latest national standards.

3. Statutory authority for the rule (including the statutory citation and language):

Sections 168.04 (1), 168.16 (4), 168.23 (1), (3) and (4),¹ and 168.28 (2)², Stats.

168.04 Standards. (1) The department by rule shall prescribe minimum product grade specifications for gasoline, automotive gasoline, gasoline-alcohol fuel blends, reformulated gasoline, as defined in s. 285.37 (1), and kerosene and may prescribe product grade specifications for aviation gasoline, fuel oils, and diesel fuel.

(2) (a) Except as provided in par. (b), the rules required under sub. (1) shall prohibit gasoline, automotive gasoline, gasoline-alcohol fuel blends, and reformulated gasoline, as defined in s. 285.37 (1), beginning on August 1, 2004, from containing more than 0.5%, by volume, of methyl tertiary-butyl ether.

(b) The rules required under sub. (1) shall not prohibit racing fuel used at racing events or in preparation for racing events from containing any amount of methyl tertiary-butyl ether.

(3) Except as otherwise provided in this section, rules promulgated under this section shall be in conformity with nationally recognized standards, specifications, and classifications, such as those published by the American Society for Testing and Materials, the Society of Automotive Engineers, and the U.S. Environmental Protection

¹ Under the 2013 Wisconsin Statutes. Previous to July 1, 2013, this provision was numbered s. 101.09 (3), stats. See Sections 1615 to 1619 of 2013 Wisconsin Act 20.

² Under the 2013 Wisconsin Statutes. Previous to July 1, 2013, this provision was numbered s. 101.142 (2), stats. See Section 1633 of 2013 Wisconsin Act 20.

Agency. The department may not promulgate or enforce a rule prohibiting the placement of additional information on the dispensing device.

168.16 (4) The department may promulgate reasonable rules relating to the administration and enforcement of this subchapter.

168.23 Rules. (1) The department shall promulgate by rule construction, maintenance and abandonment standards applicable to tanks for the storage, handling or use of liquids that are flammable or combustible or are federally regulated hazardous substances, and to the property and facilities where the tanks are located, for the purpose of protecting the waters of the state from harm due to contamination by liquids that are flammable or combustible or are federally regulated hazardous substances. The rule shall comply with ch. 160. The rule may include different standards for new and existing tanks, but all standards shall provide substantially similar protection for the waters of the state. The rule shall include maintenance requirements related to the detection and prevention of leaks. The rule may require any person supplying heating oil to any noncommercial storage tank for consumptive use on the premises to submit to the department, within 30 days after the department requests, the location, contents and size of any such tank.

(2) The department may transfer any information which the department receives under sub. (1) to any other agency or governmental unit. The department and any such agency shall treat the name of the owner and the location of any noncommercial storage tank which stores heating oil for consumptive use on the premises, required to be submitted to the department under sub. (1), as confidential and shall not permit inspection or copying under s. 19.35 of any record containing the information.

(3) The rule promulgated under sub. (1) may require the certification or registration of persons who install, remove, clean, line, perform tightness testing on and inspect tanks and persons who perform site assessments. Any rule requiring certification or registration shall also authorize the revocation or suspension of the certification or registration. The department may not require an individual who is eligible for the veterans fee waiver program under s. 45.44 to pay any fee that may be charged pursuant to such a rule.

(4) The department shall promulgate a rule specifying fees for plan review and inspection of tanks for the storage, handling, or use of flammable or combustible liquids and for any certification or registration required under sub. (3).

(5) (a) Subject to par. (b), in addition to any fee charged by the department by rule for plan review and approval for the construction of a new or additional installation or change in operation of a previously approved installation for the storage, handling or use of a liquid that is flammable or combustible or a federally regulated hazardous substance, as defined in s. 168.21 (3), the department shall collect a groundwater fee of \$100 for each plan review submittal. The moneys collected under this subsection shall be credited to the environmental fund for environmental management.

(b) Notwithstanding par. (a), an installation for the storage, handling or use of a liquid that is flammable or combustible or a federally regulated hazardous substance, as defined in s. 168.21 (3), that has a capacity of less than 1,000 gallons is not subject to the groundwater fee under par. (a).

168.28 (2) INVENTORY OF STORAGE TANKS. The department shall undertake a program to inventory and determine the location of aboveground storage tanks and underground storage tanks. The department may require its deputies and any person engaged in the business of distributing petroleum products to provide information on the location of aboveground storage tanks and underground storage tanks.

4. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

DATCP estimates that it will use approximately 0.50 FTE staff to develop this rule. That includes time required for investigation and analysis, rule drafting, preparing related documents, coordinating advisory committee meetings, holding public hearings and communicating with affected persons and groups. DATCP will use existing staff to develop this rule.

5. Description of all entities that may be impacted by the rule:

Businesses that design, install, inspect or operate storage tank systems for flammable, combustible or hazardous liquids may be impacted by this rule. This may include retail gasoline stations, fuel wholesalers or distributors, fleet operators, or farmers. It also may include petroleum equipment service companies and fire prevention inspectors.

This rule may also impact businesses that sell or distribute petroleum and other liquid fuel products; either at wholesale or retail. It may also impact businesses that manufacture, sell or distribute chemical liquids regulated under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). These businesses are already regulated under the existing rule, but there may be minor changes to the specific requirements.

If DATCP adopts the model regulations published in NIST Handbook 130, businesses that sell or distribute engine lubricants may be impacted. The current rule contains technical specifications and requirements for fuel, but not lubricant. The NIST Handbook 130 contains specifications for lubricants.

6. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:


Federal regulations for aboveground storage tanks do not address fire and public safety issues or groundwater pollution issues, except for protecting potable water supply sources. Federal regulations for underground storage tanks do not address fire and public safety issues or surface water pollution issues, except for protecting potable water supply sources. The planned rule changes are not expected to conflict with these federal regulations.

The EPA regulates standards for gasoline in a number of ways. EPA regulates the amount of sulfur in gasoline and certain toxic substances that can be emitted when fuel is burned. EPA also mandates reformulated gasoline (RFG) in certain metropolitan areas. EPA also mandates that fuels sold during the summer meet certain Reid vapor pressure standards to reduce emissions that contribute to smog.

7. Anticipated economic impact

The proposed rule may have moderate economic impact statewide and locally. The majority of the proposed rule is limited to updating and reorganizing provisions in the current rule and therefore would have a minimal economic impact -- if any at all. However, adopting more recent fuel quality standards may have a moderate economic impact on certain businesses within the petroleum industry.

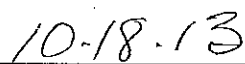
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Ben Brancel

Secretary

Department of Agriculture, Trade and Consumer Protection


Date Submitted